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Supreme Court, U.S.
FILED
JUL 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-22

In The

Supreme Court of the United States

October Term, 1988

AVERIL D. VALLIER, AVERIL D. VALLIER, A Professional Corporation, BRYON L. KIEMELE,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

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DESIGNATION OF CORPORATE RELATIONSHIPS

The Southern Pacific Transportation Company, filing this Brief in Opposition to Petition for Certiorari as Respondent (Real Party in Interest) in this proceeding, states that:

This is its original Designation of Corporate Relationships.

The Southern Pacific Company is the parent of the Southern Pacific Transportation Company.

The following companies are owned jointly between the Southern Pacific Transportation Company and other entities:

Central California Traction Company

The Ogden Union Railway & Depot Company

Portland Traction Company

Sunset Railway Company

Trailer Train Company

St. Louis Southwestern Railway Company

The Southern Pacific Transportation Company does not hold an ownership interest in any other subsidiaries, except for and excluding wholly-owned subsidiaries.

Dated: July 25, 1988.

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SOUTHERN PACIFIC TRANSPORTATION COMPANY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

Real Party in Interest, Southern Pacific Transportation Company, respectfully opposes the Petition for Writ of Certiorari or Mandamus, filed by Petitioners Averil D. Vallier, Averil D. Vallier, a Professional Corporation, and Bryon L. Kiemele.

STATEMENT OF THE CASE

Southern Pacific agrees with Petitioners' Statement of the Case insofar as it describes the general nature of this case and its procedural history. To a certain extent, however, Southern Pacific disputes Petitioners' characterization of the facts and evidence. Fortunately, it is unnecessary to discuss the relevant facts for purposes of this Opposition.

Two matters of a procedural nature do require brief mention, though. First, a copy of the District Court's written order is properly included within the Appendix section of the Petition. As Petitioners are plainly aware, however, Judge Gray has also made a number of oral rulings, some of which are very germane to the points argued. So that this Court will have a more complete picture of the case as it now stands, the transcript of proceedings on June 6, 1988, is reproduced in the Appendix to this Brief.[1]

Second, the order from which this Petition is directly taken was entered by the Court of Appeals back on April

---

[1] The first ruling made on June 6 is especially relevant to Petitioner's argument that the District Court has " . . . put[] the cart before the horse." (Petition, p. 13) In fact, the issues are to be tried on a bifurcated basis. Initially, the Court will hear evidence limited to the threshold question of whether a fraud on the court was perpetrated. If Southern Pacific does not meet its burden of proof on that issue, the trial will be concluded. Otherwise, Southern Pacific will be allowed to proceed with its case on the secondary matter of whether, and to what extent, it was damaged by that fraud. Only then would it be offering proof regarding the issues previously tried in the underlying case.

4, 1988. Thus, the 90-day period for filing the Petition would normally have expired on July 3, 1988. (28 U.S.C. § 2101(c).) However, July 3 was a Sunday, and the following day was a national holiday. Technically speaking, then, the Petition was timely received by the Clerk on July 5. (U.S.S.C. Rule 29.1.)

That Petitioners waited until the last possible day would usually make no difference. It seems curious, though, that this happened to coincide with the commencement of this Court's summer recess. Southern Pacific suspects that this timing was deliberate, calculated in some manner to cause a further postponement of the trial, which is now set to begin on September 6. Although Petitioners have not requested a stay or supersedeas from this Court, it is anticipated that they will seek a continuance from the District Court pending a ruling on this Petition. These, obvious tactics should not be condoned. If at all possible, Southern Pacific respectfully requests that the Petition be determined on an expedited basis.

SUMMARY OF ARGUMENT

Southern Pacific brought this action to rectify the harm it suffered when Petitioners obtained a judgment by means of an egregious fraud on the court. Trial is presently scheduled to commence in the District Court on September 6, 1988.

In their attempt to escape that trial, Petitioners have advanced a number of related arguments designed to cast doubt on the legal basis for Southern Pacific's claim. For

present purposes, it is unnecessary to address those arguments in any detail. Petitioners have simply failed to demonstrate proper grounds for certiorari under the guidelines of U.S.S.C. Rule 17.

Moreover, their Petition is premature. The issues raised have never been addressed on their merits in the Court of Appeals. Should Petitioners sustain an adverse judgment after trial, the normal appellate process may be relied upon to assure proper and orderly review. On the other hand, if Petitioners obtain a defense judgment, the issues will have become moot.

Finally, Petitioners have failed to show the type of "extraordinary circumstances" which would justify mandamus relief.

ARGUMENT

I.

PETITIONERS HAVE FAILED TO DEMONSTRATE GROUNDS FOR CERTIORARI UNDER U.S.S.C. RULE 17

A. The Summary Denial Of Mandamus Relief By The Court Of Appeals Represents Neither A Decision On The Merits Nor One Which Conflicts With Established Law.

U.S.S.C. Rule 17 provides three guidelines for measuring when review by certiorari is warranted. The first guideline concerns any decision by a federal court of appeals which (1) creates a split of authority within the federal court system, (2) which conflicts with state court decisions on a federal question, or (3) which reflects a significant departure "from the accepted and usual

course of judicial proceedings." None of these circumstances is presented in this case.

On April 4, 1988, the United States Court of Appeals for the Ninth Circuit denied Petitioners' application for writ of mandamus. That was the only ruling in this case by a federal court of appeals. Notably, the issues argued by Petitioners were not considered on their substantive merits. Instead, the Court of Appeals merely denied the application on grounds that Petitioners had " . . . not demonstrated extraordinary circumstances justifying mandamus relief." Thus, no major issues were decided which represent a conflict with the rulings in any other circuit. Moreover, this discretionary ruling was entirely consistent with the established limitations on mandamus relief. (*Kerr v. United States District Court* (1976) 426 U.S. 394, 402-403, 48 L.Ed.2d. 725, 732-733.)

B. This Case Does Not Involve Any State Court Proceedings.

The second guideline under Rule 17 pertains to decisions by a "state court of last resort." All proceedings in this case have been within the federal court system. There have been no rulings or involvement by any state court.

C. The Court Of Appeals Merely Denied Mandamus Relief For Lack Of Extraordinary Circumstances, And Did Not Decide Any "Important Question Of Federal Law."

The third and final guideline under Rule 17 deals with "important question[s] of federal law" decided by either a state court or a federal court of appeals. Again, the only ruling by a federal court of appeals in this case was the summary denial of mandamus relief on April 4,

1988. No "important question of federal law" was decided by that ruling.

II.

REVIEW BY CERTIORARI WOULD BE PREMATURE AT THIS STAGE OF THE PROCEEDINGS

A. The Issues Raised Have Never Been Addressed On Their Merits By The Court Of Appeals.

As noted above, the Court of Appeals did not address the merits of Petitioners' arguments, but simply denied mandamus relief on the threshold ground that there appeared no "extraordinary circumstances." Consequently, if this Court were to examine, those merits under the instant Petition, it would be the first appellate tribunal to do so. In terms of sound judicial administration, this would be very inefficient. The federal judiciary is carefully structured to promote orderly review at ascending levels of appeal. Assuming that Southern Pacific prevails at trial, Petitioners will be entitled to pursue their appellate remedies. The Court of Appeals would then have an *appropriate* opportunity to deal with the issues on their merits, and its decision may very well obviate any need for further review.

Under truly exceptional circumstances this Court may find good reason to overlook these considerations and accept a case which had not been fully determined by the Court of Appeals. (See, e.g., *Schlagenhauf v. Holder* (1964) 379 U.S. 104, 111-112, 13 L.Ed.2d 152, 159-160.) No such circumstances are evident in this case.

At first blush, there may appear one similarity with *Schlagenhauf;* Petitioners are suggesting that F.R.C.P. Rule

60(b) requires interpretation and clarification. (*Schlagenhauf* involved a construction of F.R.C.P. Rule 35.) Still, Petitioners have not raised an issue "of first impression" concerning an asserted "usurpation of power" by the trial court, such as was found to justify immediate Supreme Court attention in *Schlagenhauf*. (379 U.S. at 111, 13 L.Ed.2d at 159.) Instead, Petitioners are attempting to resurrect questions which have already been dealt with extensively in other cases. Notably, their principal argument is based upon the 44-year-old decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944) 322 U.S. 238, 88 L.Ed. 1250, as well as upon two cases decided in the last century. (*United States v. Throckmorton* (1878) 98 U.S. 61; *Marshall v. Holmes* (1891) 141 U.S. 589.) No issue of a new or novel character is presented.

Moreover, the District Court's ruling in this case was entirely consistent with established law. Without belaboring the point, Southern Pacific intends to prove that the underlying judgment was not merely tainted with perjury, but also that a member of the federal bar had knowingly contrived to present that false testimony. Such misconduct by an attorney represents a fraud on the court. (*Nix v. Whiteside* (1986) 475 U.S. 157, 168-169, 89 L.Ed.2d 123, 135-136.) Rule 60(b) clearly authorizes an independent action in equity to alleviate the wrongful consequences of a judgment that was procured by such a fraud. (See *Virgin Islands Housing Authority v. David* (3rd Cir., 1987) 823 F.2d 764, 766-767; *Great Coastal Exp. v. International Broth., Etc.* (4th Cir., 1982) 675 F.2d 1349, 1357; *H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.* (6th Cir., 1976) 536 F.2d 1115, 1119; *Kupferman v. Consolidated Research & Mfg. Corp.* (2nd Cir., 1972) 452 F.2d 1072,

1078.) "A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony." (*Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.* (4th Cir., 1987) 827 F.2d 984, 986. Cf. *Keys v. Dunbar* (9th Cir., 1969) 405 F.2d 955, 957-958.) The questionable distinction between "intrinsic" and "extrinsic" fraud is simply of no consequence where the fraud is committed by an officer of the court.

The relevant law is now well-settled. There appears no need for this Court to intervene in these proceedings, especially at the present time. No exceptional circumstances are disclosed which would justify a departure from the normal sequence of appellate review.

B. Should Petitioners Obtain A Defense Judgment At Trial, The Issues Will Have Become Moot.

The historic reluctance of this Court to address moot issues is not merely based upon the fundamental requirements of justiciability. That policy also furthers the essential goals of judicial integrity and efficiency.

In this case, it may very well become unnecessary to contend with the arguments presented in this Petition. Should Southern Pacific fail to prove its claim at trial, the theoretical basis for that claim will no longer present an issue in controversy. In that event, the entire matter will have become moot.

Accordingly, review by certiorari at this point in time would represent a potentially needless exercise. Judicial resources would be better spent in dealing with issues that are truly ripe for determination.

C. On The Other Hand, If Petitioners Suffer An Adverse Judgment At Trial, They Could Then Seek Proper Appellate Review.

Obviously, the denial of certiorari at this stage would not foreclose later review if Petitioners sustain an adverse judgment at trial. When that occurs, they could pursue their appellate remedies in the normal manner, and would be assured full consideration of their arguments in the Court of Appeals. Depending upon the outcome of that appeal, a subsequent petition to this Court might then be timely and appropriate. (Southern Pacific does not mean to suggest, however, that these issues would ever be of sufficient importance to justify this Court's attention. Again, the relevant law is well-settled.)

III.

PETITIONERS HAVE AGAIN FAILED TO DEMONSTRATE SUCH EXTRAORDINARY CIRCUMSTANCES AS WOULD WARRANT MANDAMUS RELIEF

As an alternative to certiorari, Petitioners request that this Court issue a writ of mandamus in the exercise of its original jurisdiction. In support of this unusual request, Petitioners complain that " . . . [a] person should not be forced to go to trial on a fundamentally untenable legal theory, . . . " (Petition, p.14.) As was recognized by the Court of Appeals, however, the mere prospect of trial is not a valid basis for mandamus relief.

> "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. [Citations.]" *(Kerr v. United States District Court, supra,* 426 U.S. at 402, 48 L.Ed.2d at 732.)

> "It is, of course, well settled, that the writ [of mandamus] is not to be used as a substitute for appeal [citation], even though hardship may result from delay and perhaps unnecessary trial [citations]. The writ is appropriately issued, however, when there is 'usurption of judicial power' or a clear abuse of discretion [citation]." *(Schlagenhauf v. Holder, supra,* 379 U.S. at 110, 13 L.Ed.2d at 159.)

Once again, Petitioners have not demonstrated any substantial reason for circumventing the normal and established procedures for appellate review.

CONCLUSION

For all of the foregoing reasons, Southern Pacific submits that Petitioners have failed to establish any sound basis for immediate review, either by writ of certiorari or writ of mandamus. The instant Petition should therefore be denied.

Respectfully submitted,

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APPENDIX

(p.1) UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE WILLIAM F. GRAY, JUDGE PRESIDING

- - -

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Plaintiff, vs. AVERIL D. VALLIER, ET AL., Defendant.	)	CASE NO. CV 86-5214-WPG

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, JUNE 6, 1988

ROGER D. MAY, CSR, CM, RPR
Official Court Reporter
402-A United States Courthouse
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Los Angeles, California 90012

(p.2) APPEARANCES:

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(p.3) HEARING: Defendant's motion in limine re: (1) Structure of trial; (2) Election of remedies; (3) Exclusion of evidence re July 1979 accident; (4) Exclusion of expert testimony (Lilly Barry).

Filing and spreading Order of Court of Appeals.

* * *

(p.4) Los Angeles, California, Monday, June, 6, 1988
10:00 A.M.

(Other matters heard)

The Clerk: Item No. 6, CV 86-5214-WPG, Southern Pacific Transportation Company versus Averil D. Vallier, et al.

Counsel, please state your appearances.

Mr. Cummins: Joe Cummins for the plaintiff.

Mr. Lichtman: Peter Lichtman for the defendant.

The Court: Well, gentlemen, Mr. Cummins, you say that a plaintiff may bring a fraud action and be entitled to a jury trial, but the fraud here is a fraud upon the court.

Mr. Cummins: It is –

The Court: And my view is that that is a matter for the court to determine. Now, if I determine that there was

a fraud upon the Court, then the next issue is what damages are you entitled to, and you should be entitled to a jury trial in that respect.

Mr. Cummins: Yes.

The Court: But if I determine that there has not been a fraud upon the court, then that's that.

Mr. Cummins: I still question whether or not it's for the jury to determine whether or not there is a fraud on the railroad. I would concede there's –

The Court: Well, but that – no, the jury once determined that there was not a fraud upon the railroad, but he (p.5) was entitled to recover. And I'm not going to open that up again except to protect the institution of the court.

Mr. Cummins: And if I understand Your honor, you think that the sole question, sole issue, apart from damages –

The Court: Yes.

Mr. Cummins: – Is the equitable one of fraud on the court. If there is, and it carries over so that the plaintiff railroad could prove damages.

The Court: That's right.

Mr. Cummins: All right. I won't argue with that.

The Court: All right. Then we'll bifurcate it; we'll decide whether or not there has been a fraud upon the court.

Mr. Cummins: Right.

The Court: If there has, then you'll be entitled to have a jury to determine your damages.

What about that Mr. Lichtman?

Mr. Lichtman: Your Honor, I'm in full agreement with that except for one point; that is, that Mr. Cummins has not preserved his jury right with respect to the legal issues, that is, the conversion and the assumption count. Under federal rule of civil procedure 38, Mr. Cummins did not include that as a demand in his prayer and his complaint, nor ten days after filing of the complaint, nor ten days after the last pleading.

The Court: Did you fail to demand a jury, Mr. Cummins?

(p.6) Mr. Cummins: That's correct, your honor, and I could really not care that much on those issues. I think if the court would prefer to have the jury direction or jury assistance, then the court has discretion to do it, but I'm certainly not insisting upon it.

The Court: All right. Years ago in one of my first cases in federal court, I neglected to demand a jury in connection with a pleading – I was used to the state court practice – and I think it was Judge Westover had sympathy with me, so he nonetheless said he forgave me for that and said that I could late demand a jury.

Later on the court of appeals in another case said you can't do that, and I don't need an advisory jury – you're either entitled to a jury or you're not. You're not entitled to a jury; therefore, the court will try the issues. All right, that's the first.

Second, with respect to requiring the plaintiff to make a pre-election as the whether or not he's suing for

conversion or tort. I agree with Mr. Cummins. This is not common law pleading. If he can show he is entitled to recover, I couldn't care less whether it's under tort or under contract.

Mr. Lichtman: Your Honor, I'm not too excited about this particular issue, simply bacause – and this is what I was just going to get up to clarify. If your Honor has indicated that he will bifurcate this trial, that is, try the equitable (p.7) claim first, which I think he has.

The Court: Yes.

Mr. Lichtman: Then I don't see we even get to this issue, because we're going to try the fraud on the tort issue first. I would just respectfully request that I argue that or keep that in abeyance.

The Court: All right. Third, I agree, Mr. Cummins, that I'm not disposed to have evidence with respect to the 1979 railroad action. That's the one where they ran into the rear of the train up ahead of them and the engineer was killed.

Mr. Cummins: Yes, your Honor.

The Court: Well, I don't see any relevance there.

Mr. Cummins: I don't see any either, but I think instead of a blanket order that there can be no relevance, that if something does become relevant, and the defendant brings it in, it might be relevant. That's all I'm asking.

The Court: Well, without further order of court, there will be no evidence taken or no further reference made to that 1979 action. How about that?

Mr. Cummins: Fine.

Mr. Lichtman: Fine, your Honor.

The Court: Next, the expert evidence. This is not a jury trial. I'm making the self-serving statement that I've had some experience with the state bar of California. I know something about the disciplinary processes. But I would be (p.8) glad to have expert help with respect to what are the specific obligations of an attorney when somebody tells him that, or who, if the plaintiff is right, who pursued an action knowing, at least being informed by the plaintiff that it was a fraudulent action. What are his duties? I'm not disposed to deny the opportunity of Ms. Barry to give some testimony. I may be influenced by it or I may not. But I think I have discretion there in that respect to allow such testimony, and I do not now preclude it.

How about that, Mr. Cummins?

Mr. Lichtman: Your Honor, just a point, that is that Mr. Cummins and Plaintiffs, or Plaintiff, I should say, has argued that Ms. Barry not testify as to the meaning of law, but instead will offer an expert opinion as to the duties of a member of the state bar when representing a client.

The Court: Yes.

Mr. Lichtman: And I think that's what your Honor is leaning towards.

The Court: Yes.

Mr. Lichtman: My problem with that is – and we have, based on your prior rulings, we have some assistance in that regard – is we have the direct testimony of

Ms. Lilly Barry, and I have asked your court, I have lodged it with Your Honor, to take judicial notice of it. It's going to be read based on Your Honor's prior ruling. She'll simply get up on the stand (p.9) and read this narrative statement into the record.

The Court: What is that? Where did that come from? I haven't seen that.

Mr. Lichtman: Well, this is the direct testimony of Ms. Lilly Barry who Mr. Cummins, based on your prior order, has exchanged with me as we have exchanged our expert narrative statements.

The Court: Oh.

Mr. Lichtman: So I take issue with the characterization by Mr. Cummins, since precisely in her narrative statement, which he indicates that she will allude to, does not allude to, and in fact she says, and I'm going to refer to – I can direct Your Honor's attention, if Your Honor doesn't have it, I have an extra copy and I can present this to . . .

The Court: Just tell me.

Mr. Lichtman: What she basically says is she says that the allegations made by Mr. Fitzgerald are true, then I believe Mr. Vallier violated California business and professions code sections, and she lists the sections and the rules of professional conduct. But by doing that, she's right in instructing this court as to what has been violated, which under the case law we have cited cannot be done.

The Court: What about that, Mr. Cummins?

Mr. Cummins: I think that's a shorthand method of (p.10) saying the fact, under those facts, he's violated his duties.

The Court: All right. Look, I will not exclude her direct testimony, but I'll make them all mine as to what does or does not constitute a violation of the rules of professional conduct of the state.

Mr. Lichtman: Your Honor, that's all I request.

May I just additionally request that I preserve my right, my objection at the time of trial to object to her testimony coming in, and based upon those opinions, that's all. I don't want to waive anything right now.

The Court: You're not waiving anything, but I am not granting your motion to exclude her testimony.

Mr. Lichtman: I understand. I'll just reserve my right to object at that time. Thank you, Your Honor.

Your Honor, we have another point. I'm sorry. Based on what Ms. Beard has communicated to me, and I'm sure she has to Mr. Cummins, evidently the trial date, which was scheduled for tomorrow has been kicked.

The Court: I regret that, but it's of necessity.

Mr. Lichtman: May I respectfully request that the court set this matter for trial the first week of September. I have checked with Ms. Beard; she's looked at her calendar and indicated that the court is clear on the week of September 6.

The Court: I'll give you a preference; is that satisfactory?

(p.11) The Clerk: It shows it clear.

Mr. Cummins: I'd prefer to get it tried sooner.

Mr. Lichtman: I would love it myself, Your Honor, however –

The Court: Gentlemen, I'm in trouble with my wife, and I'm going to have to try a major case involving the computer industry in San Jose beginning next week, and it will probably go well into if not through July, and I promised to take the month of August for a vacation, and I'll try you early in September, and I know we'll get it done early because we're going to go to Russia on the 25th of September. But I'll give you a priority.

Mr. Lichtman: I would request the week of September 6th.

The Court: All right. Is that Labor Day?

Mr. Lichtman: Right after.

The Clerk: The day after.

The Court: All right. The Tuesday after Labor Day. Is that satisfactory, Mr. Cummins?

Mr. Cummins: Yes, it is, Your Honor.

The Court: That will be the order, minute order will suffice.

Mr. Lichtman: One other point: because of the continuance and because of the difficulty I've had in subpoenaing these witnesses, who have agreed to appear and sign (p.12) an adknowledgment under the subpoena, may I continue those subpoenas in full force and effect?

The Court: Yes, of course.

Mr. Lichtman: Instead of having to resubpoena these people. It's very difficult.

The Court: Yes, of course. Let them know, however.

Mr. Lichtman: I will. Thank you, Your Honor.

The Court: Gentlemen, is there any reason why the mandate of the court of appeals denying as moot – let me see – denying petition for writ of mandamus and denying the motion for stay is moot should not be spread on the record of this court?

Mr. Cummins: There's no reason, Your Honor.

Mr. Lichtman: Your Honor, at this point in time, I just wish to inform the court we will be filing a petition for certain to the U.S. Supreme Court.

The Court: All right. But there's no reason why I should not spread that record?

Mr. Lichtman: I see no reason. It will not bar us.

The Court: All right. That will be the order.

(Hearing Concluded)

(p.13) (I certify that the foregoing is a correct transcript of the above-entitled matter)

/s/ Roger D. May
ROGER D. MAY, CSR. CM, RPR DATE: 7-6-88